

NO. 41774-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

THOMAS LEWIS HALL,

Appellant.

COURT OF APPEALS
DIVISION TWO
12 FEB 27 AM 8:57
STATE OF WASHINGTON
BY [Signature]
DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Frederick W. Fleming

REPLY BRIEF OF APPELLANT

VALERIE MARUSHIGE
Attorney for Appellant

23619 55th Place South
Kent, Washington 98032
(253) 520-2637

TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
A REMAND FOR RESENTENCING IS REQUIRED BECAUSE THE TRIAL COURT ERRED IN SENTENCING HALL AND ENTERING A JUDGMENT AND SENTENCE WITHOUT REQUIRING THE STATE TO PROVE HIS CRIMINAL HISTORY BY A PREPONDERANCE OF THE EVIDENCE WHEN HALL OBJECTED TO THE STATE'S ALLEGATIONS OF CRIMINAL HISTORY.....	1
B. <u>CONCLUSION</u>	5

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>State v. Bergstrom,</u> 162 Wn.2d 87, 169 P.3d 816 (2007)	1
<u>State v. Lopez,</u> 147 Wn.2d 515, 55 P.3d 609 (2002)	4
<u>State v. Mendoza,</u> 165 Wn.2d 913, 205 P.3d 113 (2009)	4
<u>State v. Ross,</u> 152 Wn.2d 220, 95 P.3d 1225 (2004)	1

A. ARGUMENT IN REPLY

A REMAND FOR RESENTENCING IS REQUIRED BECAUSE THE TRIAL COURT ERRED IN SENTENCING HALL AND ENTERING A JUDGMENT AND SENTENCE WITHOUT REQUIRING THE STATE TO PROVE HIS CRIMINAL HISTORY BY A PREPONDERANCE OF THE EVIDENCE WHEN HALL OBJECTED TO THE STATE'S ALLEGATIONS OF CRIMINAL HISTORY.

The State argues that Hall “waived the right to challenge his offender score because through counsel he had affirmatively acknowledged that it was correct,” misapprehending the holding in State v. Ross, 152 Wn.2d 220, 95 P.3d 1225 (2004). Brief of Respondent at 7. Ross is clearly distinguishable because unlike Hall, the three defendants in Ross did not object to their criminal history. Ross, 152 at 225-27. Just as unavailing is the State’s argument that because Hall requested that standby counsel represent him at sentencing, he “is no longer pro se, and is bound by the tactical decisions of his counsel.” Brief of Respondent at 7. Contrary to the State’s unsupported assertion, the Washington Supreme Court held in State v. Bergstrom, 162 Wn 2d 87, 96-98, 169 P.3d 816 (2007), that a defendant can object to his offender score pro se even when he is represented by counsel.

Citing Bergstrom, the State mistakenly argues that if the case is remanded, the State should be permitted to submit evidence to prove

Hall's offender score because the State "was entitled to rely on the stipulation to defendant's criminal history and the offender score calculation which were signed by defense counsel." Brief of Respondent at 9-10. In Bergstrom, both the State and defense counsel submitted presentence reports where defense counsel agreed that Bergstrom's standard range was 87 to 116 months. Id. at 90. At sentencing on November 5, 2004, defense counsel argued for a sentence less than the statutory minimum due to Bergstrom's poor health and requested electronic home monitoring (EHM). Neither defense counsel nor Bergstrom disputed the State's representation of Bergstrom's criminal history and an offender score of 11. The court denied the exceptional sentence request but continued the hearing to allow counsel time to determine whether Bergstrom was eligible for EHM. Id. at 90.

At sentencing on November 17, 2004, both the State and defense counsel agreed that EHM was not available to Bergstrom. For the first time, Bergstrom argued pro se that his offender score was 7, not 11, because some of his prior crimes encompassed the same criminal conduct. The State argued in response and when the court asked defense counsel if she was objecting to her client's position, she replied, "I've really never been in this situation before, your Honor. I feel like I cannot take a

position contrary to my client's. . . . I could be wrong about the same criminal conduct regarding the forgeries.” Id. at 90-91.

The Supreme Court determined that the State reasonably relied on defense counsel's presentence report, defense counsel's acknowledgment of Bergstrom's criminal history and offender score at the November 5th sentencing, and the fact that sentencing was continued for the limited purpose of ascertaining Bergstrom's eligibility for EHM. The Court concluded that based on the State's reliance, it had no reason to expect it would have to provide certified copies of Bergstrom's prior convictions at the November 17th sentencing. Id. at 95-98. The Court held that “where defense counsel agreed with the offender score and the standard range and the only objection was a pro se argument at a hearing to determine the eligibility for EHM after repeated continuances -- it would be inequitable to deny the State on remand an opportunity to prove the existence of Bergstrom's prior convictions.” Id. at 98. Given these unique circumstances, the Court remanded for resentencing, allowing both parties to submit evidence. Id.

Unlike in Bergstrom, neither the State nor defense counsel submitted presentence reports. The State did not rely on any acknowledgment by defense counsel of Hall's criminal history and offender score prior to sentencing and sentencing was not limited to a

particular purpose. Consequently, the State knew that it bears the burden to prove Hall's criminal history at sentencing. The State claims that at sentencing the court "considered the judgment and sentence entered at the bench trial without objection" and "noted that defendant's criminal history was listed on the prior judgment and sentence." Brief of Respondent at 7-8 citing RP (01/07/2011) 15. A review of the record reveals that the prosecutor stated that the "certified Judgment and Sentence related to the underlying sex offenses" was provided during trial, but the State did not provide any prior judgment and sentences at sentencing. 15RP 15-16.¹

"When a defendant raises a specific objection at sentencing and the State fails to respond with evidence of the defendant's prior convictions, then the State is held to the record as it existed at the sentencing hearing." State v. Mendoza, 165 Wn.2d 913, 930, 205 P.3d 113 (2009)(citing State v. Lopez, 147 Wn.2d 515, 520-21, 55 P.3d 609 (2002)). Contrary to the State's argument, a remand for resentencing is required and the State must be held to the existing record.

¹ The relevant portion of the record is attached as an appendix.

B. CONCLUSION

For the reasons stated here and in appellant's opening brief, this Court should vacate Mr. Hall's Judgment and Sentence and remand for resentencing.

DATED this 24th day of February, 2012.

Respectfully submitted,


VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant, Thomas Lewis Hall

APPENDIX

1 **MR. BLANFORD:** Absolutely. I can pass that.

2 **MS. GINER:** Your Honor, the State would request
3 further that you make a finding that the Court is counting
4 Mr. Hall's prior sex offenses and prior offenses in the
5 offender score that the Court sentenced him on today. And
6 the State did provide the certified Judgement and Sentence
7 related to the underlying sex offenses to the Court during
8 the course of the trial and I believe those are part of the
9 trial record.

10 **THE COURT:** That's correct.

11 **MS. GINER:** Would the Court like me to just
12 indicate that finding on the -- I could put it on the
13 stipulation. Would that be the --

14 **THE COURT:** That's fine. It's right in the
15 Judgement and Sentence what his criminal history is and I've
16 been advised and there wasn't any objection to what his
17 standard range was for each count.

18 **MR. BLANFORD:** And, Your Honor, Mr. Hall is not
19 signing the standard range. He indicates he believes it to
20 be inaccurate. He believes several of these crimes are not
21 him. And that's what he's told me, Your Honor.

22 **THE COURT:** And the State has just indicated that
23 the Judgements and Sentences were provided and admitted
24 during the trial to verify his criminal history.

25 **MR. BLANFORD:** I'm not arguing with the Court.

1 I'm simply telling the Court that Mr. Hall believes that
2 these are not his convictions and he is going to decline to
3 sign this.

4 **THE COURT:** Okay. I'm signing the order regarding
5 the blood.

6 **MR. BLANFORD:** And, Your Honor, at this time
7 Mr. Hall doesn't want to sign his identification of
8 defendant nor does he want to provide his fingerprints.

9 **THE COURT:** Well, the fingerprint deal, that's a
10 different situation. You'll have to forcibly be
11 fingerprinted.

12 **THE DEFENDANT:** If I don't sign?

13 **THE COURT:** No. If you don't put your
14 fingerprints and sign the fingerprints, then it has to be
15 done the hard way.

16 **THE DEFENDANT:** Well, let's avoid doing it the
17 hard way.

18 **THE COURT:** Okay. Then sign the things. Put your
19 fingerprints on there.

20 **THE DEFENDANT:** I'll put my fingerprints in there,
21 but I'm not signing it.

22 **THE COURT:** All right. And, Counsel, will you put
23 on there that he refused to sign.

24 **MR. BLANFORD:** I did put that, Your Honor.

25 **THE COURT:** And put your name on there that you

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Thomas Roberts, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 24th day of February, 2012 in Kent, Washington.



VALERIE MARUSHIGE

Attorney at Law

WSBA No. 25851

COUNTY OF PIERCE
12 FEB 27 AM 8:57
STATE OF WASHINGTON
BY _____
DEPUTY